



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 04-064

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 2002.]

1. Statutory Authority

a. While there is value in placing a definition of “navigable waterway” in the Administrative Code, the definition of “navigable waterway” in s. NR 323.03 (8) does not appear to conform with the current statutory definition of navigability and court interpretations of this term. In particular, the test for navigability developed by the Wisconsin Supreme Court in *De Gayner and Co. v. DNR*, 70 Wis. 2d 936, 236 N.W.2d 217 (1975), refers to a navigable body of water as being water that is capable of floating the lightest boat or skiff available for recreational use. The definition in sub. (8) states that a navigable body of water is one that is capable of floating the lightest boat or skiff used for recreation or *any other purpose* [emphasis added].... Also, the definition in sub. (8) applies to both lakes and streams, whereas the float test in the second sentence in sub. (8) is based upon the *De Gayner* test of navigability, which only applied to streams. The test of navigability for a lake is articulated in a different court case, *Baker et al. v. Voss*, 217 Wis. 15, 259 N.W. 413 (1935).

In addition, the definition of “navigable waterway” in s. 30.01 (4m), Stats., provides virtually no information on how to determine whether a particular body of water is navigable. The department may wish to consider defining “navigable waterway” by a cross-reference to the statute, but adding to the rule a comprehensive procedure on determinations of navigability. Another approach would be to add a note after the rule definition that cross-references the statutory definition, with an extensive description of the law of navigability in this state.

See also the comment below on the placement of this definition.

b. Section NR 323.04 (1) (c) 5. requires a riparian to report the placement of a fish habitat structure to the local department fisheries biologist within 30 days after placement. Assuming that the treatment of s. 30.12, Stats., by 2003 Wisconsin Act 118 is constitutional and not a violation of the Public Trust Doctrine, then this requirement for the reporting of the placement of exempt fish habitat structures appears to exceed the department's rule-making authority specified in s. 30.12 (1p), Stats. Subsection (1p) limits the department's authority to promulgate rules concerning exempt activities under sub. (1g), including the placement of a fish habitat structure on the bed of a navigable water under sub. (1g) (c), to rules that *only* relate to reasonable installation practices, reasonable construction and design requirements, and reasonable limitations on the location of the placement of the structures or the deposit of materials at the site affected by the activity.

c. Section NR 323.04 (1) (c) 7. prohibits dredging under s. 30.20 (1g) (b) 1., Stats., for the placement of an exempt fish habitat structure. Similarly, s. NR 323.05 (1) (c) 6. prohibits dredging under this statute for the placement of an exempt nesting structure, if the dredging exceeds one cubic yard. These restrictions do not appear to be supported by the department's rule-making authority under s. 30.20 (1k), Stats., assuming that the treatment of s. 30.20 by 2003 Wisconsin Act 118 is constitutional and does not violate the Public Trust Doctrine. Under s. 30.20 (1k) (a), the department may promulgate rules concerning exempt activities under sub. (1g), including removal of material from the bed of a navigable water necessary to place or maintain a structure exempt from any permitting requirements, such as exempt fish habitat and wildlife habitat structures, that *only* do any of the following: establish reasonable procedures for undertaking the removal of material to minimize the environmental impact; or establish reasonable limitations on the location of the removal of material at the site affected by the activity. Furthermore, s. 30.20 (1k) (b) establishes that the rules establishing reasonable procedures for the undertaking of the removal of the material under par. (a) may not establish procedures that prohibit undertaking the removal of the material or that render the undertaking economically cost-prohibitive.

2. Form, Style and Placement in Administrative Code

a. The summary accompanying the rule does not contain any of the following information required by 2003 Wisconsin Acts 118 and 145: analysis or identification of supporting documents that the department used in support of its determination of the proposed rule's effect on small business, a determination on whether the rule will have a significant fiscal effect on the private sector, and if so, the anticipated costs that will be incurred by the private sector in complying with the rule, and a statement as to whether the rule affects small business. There are several headings in the summary that do not have any material after them.

b. Since the definition of "navigable waterway" in s. NR 323.03 (8) has broader application than only to the regulation of fish and wildlife habitat structures in navigable waterways, the department should consider placing the definition of this term in a more generally applicable chapter of its rules, such as ch. NR 1, and then referencing that definition in ch. NR 323.03.

c. The rule defines “similar device” in s. NR 323.03 (12) and then does not use this defined term elsewhere in the rule. The department should either use this term elsewhere in the rule or delete the definition.

d. The phrase “as defined in s. 30.01 (1am), Stats., and identified by the department in s. NR 1.05” in ss. NR 323.04 (1) (c) 1. and 323.05 (1) (c) 1. is redundant with the definition of “area of special natural resource interest” in s. NR 323.03 (1) and should be deleted.

e. The use of “must” in ss. NR 323.04 (1) (c) 4. and 323.05 (1) (c) 4. does not conform with preferred drafting style. [See s. 1.01 (2), Manual.]

f. There are several instances in the rule of introductory material that should end with a colon. For example, see s. NR 323.04 (1) (d) (intro.) and (f) (intro.)

g. Sections NR 323.04 (1) (i) and 323.05 (1) (d) should have titles, as titles are provided for the other paragraphs in these subsections. [See s. 1.05 (6), Manual.]

4. Adequacy of References to Related Statutes, Rules and Forms

a. In the summary accompanying the rule, the list of statutes authorizing rule-making should not include s. 30.12 (1), Stats., as this subsection does not explicitly authorize rule-making. This list should include s. 30.20 (1k), Stats., due to the provisions on dredging in ss. NR 323.04 (1) (c) 7. and 323.05 (1) (c) 6.

b. In the summary accompanying the rule, the list of statutes interpreted by the rule should include the following statutes: s. 30.10 (1) and (2), Stats., due to the definition of “navigable waterway” in s. NR 323.03 (8); s. 30.20 (1g) (b) 1., Stats., due to the provisions on dredging in ss. NR 323.04 (1) (c) 7. and 323.05 (1) (c) 6; and ss. 30.15, 30.292, 30.294, and 30.298, Stats., due to their interpretation in s. NR 323.06 (3). In addition, this list of statutes interpreted includes a reference to s. 30.20 (1g) (b) 2., Stats., though the provision in the rule that interprets this statute, other than the statement on applicability in s. NR 323.02, is not apparent.

c. Should the reference in s. NR 323.02 to s. 30.20 (1g) (b) 2., Stats., be to s. 30.20 (1g) (b) 1.? Also, the purpose statement in s. NR 323.01 should have cross-references that are consistent with the cross-references in s. NR 323.02.

d. The reference in s. NR 323.03 (1) to s. NR 1.05 is vague. Based on the text of s. NR 1.05 in Clearinghouse Rule 04-066, should the reference be to s. NR 1.05 (4).

e. The references to ch. NR 310 in ss. NR 323.04 (1) (a), (2) (a), and (3) (a) and NR 323.05 (1) (a), (2) (a), and (3) (a) are vague. Can the department be more specific?

f. The rule incorporates two alternative requirements for the design and placement of wing deflectors in s. NR 323.04 (1) (f) 1. that are set forth in the cited books. Consent for incorporation of these requirements must be obtained from the Revisor of Statutes and Attorney General pursuant to s. 227.21 (2) (a), Stats. The summary accompanying the rule should, but does not, indicate that this consent has been given.

g. The reference in s. NR 323.04 (3) (c) to the standards for an individual permit should be to s. 30.12 (3m) (c), Stats., rather than s. 30.12 (3m), Stats.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The federal regulatory analysis in the summary accompanying the rule states that “(a)n individual permit from the [U.S. Army Corps of Engineers] is required, unless Wisconsin regulates the project in its entirety under ch. 30, Stats., in which case the project is authorized by the Corps under general permit GP-01-WI or GP-LOP-WI.” It is not clear from this statement how the Corps will regulate a project that is exempt under s. 30.12 (1g) (c), Stats., such as a fish crib subject to s. NR 323.04 (1) (d).

b. The note following s. NR 323.03 (1) would be more useful to a reader of the rule if the specific types of areas that possess significant scientific value were listed rather than the general reference listed in item (c) in this note.

c. Should “and” be “or” in s. NR 323.03 (2)? Such a change would provide a reference to “biological or inert materials,” as also given in s. NR 323.03 (5) and (12).

d. The department should review the definition of “nesting structure” in s. NR 323.03 (9) to determine if a nesting structure should be defined as a type of wildlife habitat structure. As drafted, it is not clear if references to “wildlife habitat structure” in the rule include a reference to nesting structures. See, for example, ss. NR 323.05 (4) and 323.06 (4).

e. The definition of “similar device” in s. NR 323.03 (12) includes the undefined terms “stake beds” and “low barriers.” The department should review this definition and its use in the rule to determine if these terms should be defined to ensure the consistent application of the rule.

f. Section NR 323.03 (6) refers to a “half log” whereas s. NR 323.03 (12) refers to a “half-log.” The department should use consistent spelling of this term.

g. Section NR 323.04 (1) (c) 3. refers to “the riparian’s zone of interest, as determined by one of the methods outlined in s. NR 326.04.” This provision is ambiguous because s. NR 326.04 does not explicitly refer to a “riparian’s zone of interest.” Does the department intend that this zone refer to the apportionment of riparian rights between adjacent riparians, as set forth in s. NR 326.07? In addition, the pier standards in s. NR 326.04 (1) and the riparian rights determinations in s. NR 326.07 generally extend to the “line of navigation,” as defined in s. NR 326.03 (4). This line is, in general, the three-foot contour of water depth. The apparent requirement that a fish habitat structure be placed within the line of navigation may conflict with other provisions in the rule. For example, fish cribs must be placed in at least 10 feet of water under s. NR 323.04 (1) (d) 1.

h. To assist a reader of the rule in filing the report required under s. NR 323.04 (1) (c) 5., the department should consider adding a note after that subdivision that indicates how a riparian may contact “the local department fisheries biologist” to file the required report.

i. The use of “prescriptions” in s. NR 323.04 (1) (f) 1. is potentially confusing. Would another term, such as “recommendations,” be clearer.

j. The department should review the entire rule and revise it to be drafted in the active voice, consistent with the preferred drafting style. [See s. 1.01 (1), Manual.] Examples of provisions in the passive voice include ss. NR 323.04 (3) (c) and 323.05 (1) (a).

k. The note following s. NR 323.05 (3) (c) is not clear. Is this note intended to apply to the standards in s. NR 323.05 (1) (c), (2) (c), and (3) (c), or just (3) (c)? Also, what is meant by the reference to a “comparable procedure” in the note? Since the procedures are apparently not identical, how do they differ?

l. How is the surface area of a nesting structure measured to determine whether it exceeds the 25 square feet limitation in s. NR 323.05 (1) (c) 7.? Does this surface area include the surface area of a vertical pole supporting a horizontal platform?

m. Sections NR 323.04 (1) (i) and 323.05 (1) (d) relate to a fish habitat structure or wildlife habitat structure that is not eligible for an exemption under s. 30.12 (1g), Stats. If the department intends to exercise its authority to require a general or individual permit under s. 30.12 (2m), Stats., for a structure that otherwise qualifies for an exemption, then the department should consider adding a provision to the rule that implements this authority.

n. The reference in s. NR 323.06 (1) to the noncompliance with the cited provisions possibly resulting in a forfeiture appears to preclude a fine or imprisonment, as authorized under s. 30.12 (5). Is that the department’s intent?

o. The second sentence in s. NR 323.06 (1) would be clearer if the phrase “authorized under” was inserted before “a general permit” in the second sentence.

p. The application of the second and third sentences in s. NR 323.06 (1) for an activity authorized under a general permit when the only violation was a failure to follow procedural requirements is not clear. One reading of these two sentences is that the second sentence would apply to this situation only if there was good cause shown for the failure to follow procedural requirements. Is that the department’s intent?